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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PEOPLE OF THE TERRITORY OF GUAM, Petitioner

v.

CONCEPCION OKADA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 3731 authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

2. Whether a local statute, in conjunction with 28 U.S.C. § 1291, authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Attorney General, on behalf of the People of the Territory of Guam, petitions for a Writ of Certiorari to review the opinion and order of the United States Court of Appeals for the Ninth Circuit dismissing Petitioner's appeal for lack of jurisdiction and denying its petition for rehearing en banc.

QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 3731 authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

2. Whether a local statute, in conjunction with 28 U.S.C. § 1291, authorizes an appeal by the government of Guam from an opinion of the appellate division of the District Court of Guam dismissing an indictment and reversing a criminal conviction.

OPINIONS BELOW

The opinion of the appellate division of the District Court of Guam dismissing the indictment and reversing respondent's conviction below was filed on April 8, 1980. Petitioner appealed, and, on April 9, 1981, the United States Court of Appeals for the Ninth Circuit issued an opinion dismissing the appeal for lack of jurisdiction. The initial opinion subsequently was withdrawn on July 15, 1981 and vacated. Thereafter, a second opinion dismissing petitioner's appeal was filed

on December 9, 1982. That opinion was amended in an order filed September 12, 1983 denying petitioner's petition for rehearing en banc.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the opinion entered by the United States Court of Appeals for the Ninth Circuit on December 9, 1982, as amended by the order entered September 12, 1983, denying the petition for rehearing. The Court's jurisdiction over this petition is asserted pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 G.C.A. § 130.20 provides:

Appeals Allowed by Government.

> (a) An appeal may be taken by the government from any of the following:
>
> (1) An order granting a new trial.
>
> (2) An order arresting judgment.
>
> (3) An order made after judgment, affecting the substantial rights of the government.

(4) An order modifying the verdict on finding by reducing the degree of the offense or the punishment imposed.

(5) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(6) An order granting a motion to suppress evidence. This appeal may be taken prior to trial if the appeal is timely filed pursuant to § 130.40 of the Criminal Procedure Code and before the trial has commenced. Upon the timely filing of an appeal pursuant to this Subsection, the Superior Court shall stay all proceedings until the Appellate Court has acted pursuant to § 130.60 of the Criminal Procedure Code.

(b) When an appeal is taken pursuant to Paragraph (5) of Subsection (a), the prosecuting attorney shall be prohibited from refiling the action which was appealed.

18 U.S.C. § 3731 provides:

Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more, counts, except that no appeal shall lie where the double jeopardy clause

of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provision of this section shall be liberally construed to effectuate its purposes.

28 U.S.C. § 1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the

District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. As amended Apr. 2, 1982, Pub.L. 97-164, Title I, §124, 96 Stat. 36.

28 U.S.C. § 1294 provides:

Circuits in which decisions reviewable.

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

48 U.S.C. § 1424:

Courts of Guam; Jurisdiction; Procedure.

(a) There is created a court of record to be designated the "District

Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all cases arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam.

Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The judge appointed for the court by the President shall be the presiding judge of the appellate division and shall preside therein unless disqualified or other wise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges assigned to the court from time to time pursuant to section 24(a) [48 U.S.C. 1424(b)] of this Act [Organic Act]. The concurrence of two judges shall be necessary to any decision by the District Court of Guam on the merits of an appeal but the presiding

judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take and prosecute it in accordance with the applicable law or rules of procedure

(b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 3072 of Title 28, in civil cases; section 2073 of Title 28, in admiralty cases; sections 3771 and 3772 of Title 18, in criminal cases; and section 53 of Title 11, in bankruptcy cases; shall apply to the District Court of Guam and to appeals therefrom; except that no provisions of any such rules which authorize or require trial by jury or the prosecution of offenses by indictment by a grand jury instead of by information shall be applicable to the District Court of Guam unless and until made so applicable by laws enacted by the Legislature of Guam, and except further that the terms "attorney for the government" and "United States attorney", as used in the Federal Rules of Criminal Procedure, shall, when applicable to cases arising under the laws of Guam, mean the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

Federal Rule of Criminal Procedure 54(c) provides in part:

> "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

STATEMENT OF THE CASE

Respondent was indicted for the offense of unauthorized, unlawful delivery of a controlled substance (heroin) on March 9, 1978. After jury trial on August 28 and 29, 1978, a verdict was returned finding respondent guilty of the charge. Respondent moved for a new trial based upon the Petitioner's alleged failure to provide certain discovery. The motion was denied, and, on September 21, 1978,

respondent was sentenced to ten years confinement and fined ten thousand dollars.

Respondent appealed her conviction to the appellate division of the District Court of Guam pursuant to section 130.15 of Guam's Criminal Procedure Code and 48 U.S.C. § 1424. Her conviction was reversed and the indictment dismissed with prejudice on April 8, 1980. Petitioner then appealed to the United States Court of Appeals for the Ninth Circuit on April 11, 1980, pursuant to section 130.20 of Guam's Criminal Procedure Code and 28 U.S.C. § 1291. Respondent moved to dismiss the appeal for lack of jurisdiction.

The court of appeals heard oral argument on the merits of the matter, then dismissed the appeal on April 9, 1981. After the issuance of this Court's decision in Arizona v. Manypenny, 451 U.S. 232 (1981), the court of appeals withdrew and vacated its initial opinion. Without soliciting additional briefs or allowing further argument on the possible

ramifications of the Manypenny decision, the court filed a second opinion dismissing petitioner's appeal on December 9, 1982. The court determined neither 28 U.S.C. § 1291 nor 18 U.S.C. § 3731 provided the necessary authority for petitioner's appeal. The former did not constitute express statutory authority for government appeals in criminal cases and the latter only authorized criminal appeals by the federal government. The court acknowledged the existence of a Guam statute which expressly authorized appeals by the government in criminal cases, but held the Guam Legislature lacked the power to authorize such an appeal beyond the appellate division of the District Court of Guam. The court determined Arizona v. Manypenny did not require a different result and stated petitioner's proper recourse was to the U.S. Congress.

The Government filed a petition for rehearing and a suggestion of rehearing en banc on April 23, 1981. Petitioner contended

the Court of Appeals had misread and misapplied Arizona v. Manypenny and had failed to consider a new opinion by the United States Court of Appeals for the Third Circuit holding criminal appeals by the government of the Virgin Islands were cognizable under 18 U.S.C. § 3731. Virgin Islands v. Christensen, 673 F2d 713 (1982). The suggestion was rejected and the petition denied on September 12, 1983.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The decision in this case by the United States Court of Appeals for the Ninth Circuit offers this Court an opportunity generally to address the criminal appellate rights of territorial governments. Specifically, it permits the Court to resolve conflict between the decisions of two federal circuits which have considered those rights and to interpret what effect the Arizona v. Manypenny ruling has upon the matter. Most importantly, this Court

is asked to decide finally whether United States territories are arms of the federal government or independent sovereigns regarding the enactment and enforcement of their criminal laws. The United States Court of Appeals for the Third Circuit has concluded the government of the Virgin Islands is essentially a federal entity with certain concomitant appellate rights and limitations. Virgin Islands v. Christensen, supra. Not only has the United States Court of Appeals for the Ninth Circuit failed to determine the nature of Guam's judicial status, it simultaneously has precluded the territorial government from all criminal appellate review by an Article III court. The People of the Territory of Guam petition this Court to fill the vacuum created by the Ninth Circuit's decision.

I.

Express statutory authority for criminal appeals by the federal government is provided by 18 U.S.C. § 3731. Although the statute's language limits such appeals to the pre-trial suppression of evidence and the dismissal of an indictment or an information, its authorizing power has been broadened by judicial interpretation to include matters not specifically mentioned in its provisions. United States v. Scott, 437 U.S. 82 (1978); United States v. Hetrick, 627 F2d 1007, opinion amended, 644 F2d 713 (9th Cir. 1980); United States v. Forcellati, 610 F2d 25 (1st Cir. 1979); Cf. Carroll v. United States, 354 U.S. 394 (1957). This is consonant with the legislative intent behind the statute that it be liberally construed to allow appeals whenever the Constitution permits. United States v. Wilson, 420 U.S. 332 (1975). Extension of the provision's scope has involved not only the matters being appealed but also the entity

appealing. Virgin Islands v. Christensen, supra.

In Christensen the United States Court of Appeals for the Third Circuit held 18 U.S.C. § 3731 authorizes the appeal of a judgment of acquittal by the government of the Virgin Islands. The court determined in matters of criminal prosecution the government of the Virgin Islands acts as an arm of the federal government and not as an independent sovereign. United States v. Wheeler, 435 U.S. 313 (1978). It further decided, although a judgment of acquittal is not expressly mentioned as an appealable matter in section 3731, such an order may be reviewed pursuant to that section, if its potential reversal will not result in a retrial, i.e., will not violate the double jeopardy clause. United States v. Scott, supra.

The United States Court of Appeals for the Ninth Circuit noted the Christensen decision in its amended opinion dismissing petitioner's

appeal. Nevertheless, it refused to reach a similar result and criticized the Third Circuit's analysis for its constitutional rather than statutory focus. There is no doubt Christensen embodies a broad construction of 18 U.S.C. § 3731 designed to permit a legitimate government appeal in a criminal case. The policy considerations which prompted that result and which have characterized similar decisions by this Court are entirely lacking in the Ninth Circuit's opinion. That court adopts a narrow, literal construction of 18 U.S.C. § 3731 to deny petitioner's inclusion within the statute's ambit. The conflict created between the two circuits by their differing interpretations is two-fold. First, they disagree as to the essentially federal nature of territorial governments. Second, they read the same statutory language and reach entirely opposite conclusions.

An adoption of the Christensen rationale by this Court is both feasible and desirable

--- feasible because of the similarities which exist between Guam and the Virgin Islands' appellate situation; desirable because of the need for uniformity regarding the appellate rights of similarly-situated territorial governments. The decision from which petitioner appeals, the dismissal of an indictment, falls squarely within the scope of 18 U.S.C. § 3731. Like the Virgin Islands, Guam is an unincorporated territory whose judicial system is the product of federal legislation. Mookini v. United States, 303 U.S. 201 (1938). Opinions of the appellate division of a territorial district court are appealable under the same statute which authorizes appeals from decisions of the district court. Corn v. Guam Coral Co., 318 F2d 622 (9th Cir. 1963); Southerland v. St. Croix Taxicab Ass'n., 315 F2d 364 (3rd Cir. 1963). Rule 54(c) includes the Attorney General of Guam within its definition of "attorneys for the government" as that phrase is used in the

Federal Rules of Criminal Procedure, indicating the quasi-federal status a territorial government attorney possesses. Finally, Guam's statute authorizing appeals by the government in criminal cases is even more inclusive than that of the Virgin Islands and illustrates a local desire for broad review of decisions preventing or nullifying criminal prosecutions.

The Christensen decision reflects a line of reasoning more closely aligned with recent decisions and legislation in the area of government criminal appeals than the rationale espoused in Okada. Their differing interpretations of the same statute has created an unacceptable ambiguity which should be resolved by this Court.

II.

The court of appeals' determination that 28 U.S.C. § 1291 alone cannot authorize petitioner's is not challenged. Petitioner

does find fault, however, with the court's failure to supplement that general jurisdictional provision with the express appellate authority found in 8 G.C.A. § 130.20(a) and thereby establish the propriety of petitioner's appeal. In Arizona v. Manypenny, this Court determined: (1) The "express statutory authorization" requirement for government criminal appeals may be satisfied by the identification of an appropriate local rather than federal statute; (2) The critical inquiry regarding the authorization of a prosecutorial appeal is whether the appeal is affirmatively sanctioned by the same sovereign that sponsors the prosecution; and (3) Local authorization of the government's right to seek review of a criminal judgment and 28 U.S.C. § 1291, when read in conjunction, may do what neither can do alone, that is, enable a grant of federal appellate jurisdiction.

The Ninth Circuit never reaches such a progression of thought because it views the

federal and local statutes disjunctively. After discounting entirely the applicability of 28 U.S.C. § 1291, the court limits the authorizing power of 8 G.C.A. § 130.20 to appeals from decisions of Guam's local trial court. It dispenses with 18 U.S.C. § 3731 in a footnote. The court never considers any of the relevant statutory provisions in tandem. If it had done so, a different result would have obtained. (See, Territory of Guam v. Olsen, 607 F2d 234 (9th Cir. 1979)(Opinion later withdrawn).

The rationale used by the court of appeals alternately ignores and runs contrary to this Court's reasoning in Arizona v. Manypenny. Guam's statute authorizing criminal appeals by its government, 8 G.C.A. § 130.20, is non-specific regarding the court to which such an appeal is granted. The general jurisdictional statute, 28 U.S.C. § 1291, is similarly non-specific concerning the type of final district court decisions properly reviewable by the

court of appeals. Corn v. Guam Coral Co., supra. Both laws are open to a construction permitting the necessary review of this appeal by an Article III court. Territory of Guam v. Olsen, 540 F2d 1011 (9th Cir. 1976), aff'd, 431 U.S. 195 (1977). At one time, the Ninth Circuit adopted such an explication. Now, however, it insists on perpetuating the very same narrow construction which was reversed in Manypenny. Once again, this Court must prod the court of appeals into a new mainstream of legal thought.

CONCLUSION

For the reasons stated above, petitioner urges this Court to grant the writ of certiorari requested.

Respectfully submitted this 9th day of December, 1983.

RICHARD G. OPPER
Attorney General

BY: MARCEIL D. YEATER
Assistant Attorney General

APPENDIX

A) Opinion, D.C. Criminal Apeal No. 78-00041A, filed April 8, 1980 . . . . . 1a

B) Opinion, Criminal No. 80-1233, Argued and Submitted November 13, 1980 . . . . . 10a

C) Opinion, Criminal No. 80-1233, D.C. Criminal No. 78-00041A, Originally filed April 19, 1981 . . . . . 23a

D) Order for Publication, Criminal No. 80-1233, D.C. 78-00041A, filed September 12, 1983 . . . . 44a

APPENDIX A
THE DISTRICT COURT OF GUAM

APPELLATE DIVISION

TERRITORY OF GUAM

PEOPLE OF THE TERRITORY OF GUAM,	)	D.C. CRIMINAL APPEAL NO. 78 00041A
Plaintiff-Appellee,	)	
vs.	)	(S.C. Criminal Case No. 34F-78)
CONCEPCION OKADA,	)	O P I N I O N
Defendant-Appellant.	)	

Before: DUENAS and LAURETA, District Judges, and BURNETT, Designated Judge.

PER CURIAM:

Convicted by a jury of delivering heroin, the defendant below was sentenced to a term of ten years and she was fined ten thousand dollars. (Judgment filed September 22, 1978). Several issues are presented on appeal, some of which when taken alone would require reversal with an order for a new trial. However, at least one of the errors

complained of by defendant is so basic to a right to a fair trial that this Court, in reversing the conviction below, orders that the indictment be dismissed with prejudice.

Defendant was indicted on March 8, 1978 and after a series of pretrial motions, trial was finally set for July 28, 1978. However, when defendant and her counsel appeared on this date, she was told that an order had been entered by the trial court on July 24, 1978 to continue proceedings until August 11, 1978. When defendant formally objected to the unexplained delay, trial was rescheduled to commence on August 1, 1978.

However, this matter was continued once again on the Court's own motion for August 8, 1978, even though the transcript clearly indicates that there was a Superior Court Judge ready and able to hear the case on short notice. Finally, trial was continued once more, based on a long distance telephone call by the Presiding Judge of the Superior

Court stating that he desired to handle the case himself and that trial should be delayed indefinitely pending completion of a murder trial scheduled for the following week.

Trial was finally commenced before the presiding judge on August 28, 1978. This was a month after trial was originally scheduled to proceed and after the defendant had moved unsuccessfully to have the presiding judge disqualified for bias. On the morning of trial, the government filed a document titled "Supplemental Discovery" which stated that several tape recordings of the defendant's conversations had been discovered to have been made, and that certain of these tapes had been lost.

The trial judge refused to allow introduction of the tapes in the case in chief, because there was no mention of any tapes in the government's previous answer to discovery relating to electronic surveillance. However, the tapes were subsequently

admitted to rebut the defendant's statements on the stand that she had not been involved in any heroin transaction. Defendant's request for a one-week continuance to study the tapes was denied.

At the outset we are confronted by the fact that due to the government's negligence, the accused was severely hampered in the preparation of her defense. There can be no question that when the prosecutor's office failed to file a timely response to defendant's request for discovery, the accused was put at a distinct disadvantage in being required to proceed with the tape recordings dangling like a sword over her head as rebuttal evidence. However, even more basic to this appeal is whether the loss of the tape recordings requires dismissal of the indictment. As stated in United States v. Bryant, 448 F.2d 1182, 1184, "all discoverable evidence must be preserved; and tapes are no less discoverable . . . because they are of poor

quality. It is the defendant's right to discover such evidence and decide for himself its usefulness."

We have an instance here where a government agent surreptitiously recorded certain crucial conversations, following no established police procedure and then unilaterally deciding that they were of no probative value. The record is unclear whether the tapes were lost or destroyed, but the end result to the defendant was the same: she was unable to use a possibly exculpatory piece of evidence due to the government's clear negligence in investigating and preparing a case. Based on Bryant, supra, dismissal of the indictment must result, where, as here, there is no showing of excusable neglect.[1/]

We are also very concerned by the fact that defendant's trial was delayed for a period of over four weeks because the Presiding Judge of the Superior Court desired to hear the case personally, even though there

was at least one other Superior Court judge available at the original trial date. In addition to the right to a speedy trial guaranteed by the U.S. Constitution, Section 1.11 of the Guam Criminal Procedure code states that a defendant is entitled "to a speedy and public trial." Although, it is within the discretion of the Superior Court to prepare its trial calendar, a defendant's right to a speedy trial should not be unreasonably delayed to accommodate an individual judge's schedule.

Closely related to the issue of unwarranted continuances of defendant's trial date is the question of whether or not the presiding judge should have disqualified himself from trying defendant's case. While the presiding judge arguably showed an abnormal interest in defendant's case in ordering the continuances, (and seemed to take the disqualification motion as a personal affront),[2/] the affidavit filed in support

of disqualification fails to set forth a clear case of specific bias against the particular defendant, Mrs. Okada.

This is not to suggest that we condone the action taken, which plainly and effectively destroyed the defendant's right to a speedy trial. If the indictment were not already ordered dismissed on the ground of government neglect in gathering evidence, we would be seriously pressed to consider whether or not dismissal of the indictment on speedy trial grounds would be appropriate. Also, it would seem that reversal of defendant's conviction alone would not be an effective sanction, because granting of a new trial would only result in defendant's being subjected to trial at a much later date than originally scheduled. The right to a speedy trial is not to be taken lightly; regardless of past scheduling practices in the Superior Court, a defendant's trial date should not be unrea-

sonably delayed so that an individual judge may be present at trial.

The remaining issues as to ineffectiveness of counsel and the court's refusal to allow the off-island deposition of an unavailable witness for the defense are rendered moot by the analysis above, as is the question of certain allegedly improper matters considered at sentencing.

Concomitant with the reversal of defendant's conviction, it is hereby ordered that the indictment be dismissed with prejudice.

SO ORDERED.

CRISTOBAL C. DUENAS

ALFRED LAURETA

HAROLD W. BURNETT

FOOTNOTES

1/ it is true that the Court in Bryant finally affirmed the conviction involving a lost tape, but only after it had balanced several factors involving the actual unintelligibility of the tape in question and the strong evidence of guilt adduced at trial. However, here, we do not have such strong factors to balance against the apparent negligence of the government. The record is not entirely clear as to what extent the tapes were intelligible, and the only real evidence against the defendant were the statements made by the agent who made the tape recordings. Also the negligence present in the instant appeal was considerably more egregious than present in Bryant, where there was at least a good faith effort to follow certain formalized procedures in collecting evidence.

2/ See e.g. August 23, 1978 Transcript.

APPENDIX B

PEOPLE OF the TERRITORY OF GUAM, Plaintiff-Appellant,

v.

Concepcion OKADA, Defendant-Appellee.

No. 80-1233.

United States Court of Appeals, Ninth Circuit.

Appeal from the District Court of Guam, Appellate Division.

Argued and Submitted Nov. 13, 1980.

Decided April 9, 1981

Before SKOPIL, FLETCHER and PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge

Concepcion Okada was convicted in the Superior Court of Guam on a charge of delivering heroin. The appellate division of the District Court of Guam reversed the conviction and dismissed the indictment, holding that Okada's due process rights had been violated by the government's failure to preserve certain discoverable evidence. The People of the Territory of Guam brought this appeal, and

Okada moved to dismiss on the ground that Guam lacks statutory authority to appeal from the appellate division of the District Court of Guam's reversal of a conviction. We postponed consideration of Okada's motion until such time as the case was heard on the merits. We now grant Okada's motion and dismiss this appeal for lack of jurisdiction.

I

It has long been established that the government may not appeal in a criminal case in the absence of express statutory authority. United States v. Wilson, 420 U.S. 332, 336, 95 S.Ct. 1013, 1018, 43 L.Ed.2d 232 (1975; Carroll v. United States, 354 U.S. 394, 400, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442(1957); United States v. Sanges, 144 U.S. 310, 318, 12 S.Ct. 609, 612, 36 L.Ed. 445 (1892). The Supreme Court has explained that "'appeals by the Government in criminal cases are something unusual, exceptional, not

favored,' . . . at least in part because they always threaten to offend the policies behind the double jeopardy prohibition." Will v. United States, 389 U.S. 90, 96, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967) (quoting Carroll 354 U.S. at 400, 77 S.Ct. at 1336). The rule prohibiting government appeals except where expressly authorized by statute extends "over and above the constitutional protection against double jeopardy," however. DiBella v. United States, 369 U.S. 121, 130, 82 S.Ct. 654, 659, 7 L.Ed.2d 614 (1962). Although Guam's appeal would not violate the double jeopardy clause,[1/] we must neverthless dismiss for lack of jurisdiction unless Guam can show that its appeal is expressly authorized by statute.

II

28 U.S.C. § 1291 (1976) grants this court jurisdiction over "all final decisions of . . . the District Court of Guam . . . except where a direct review may be had in the

Supreme Court." However, section 1291 alone does not provide necessary authority for government appeals in criminal cases. DiBella v. United States, 369 U.S. 121, 130, 82 S.Ct. 654, 659, 7 L.Ed.2d 614 (1962); Umbriaco v. United States, 258 F.2d 625, 626 (9th Cir. 1958); Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3d Cir. 1973). Hamilton provides a close parallel to the present case. The District Court of the Virgin Islands had reversed a criminal conviction, and the Government of the Virgin Islands brought an appeal to the Third Circuit. The Third Circuit rejected the suggestion that section 1291, standing alone, authorized the Virgin Islands' appeal. Finding no other statutory authorization for the appeal, the court dismissed for lack of jurisdiction.

Guam points out that the Third Circuit, after reaching this result, noted that its conclusion was

> reinforced by the fact that under the local law of the Virgin Islands the

> defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court. 4 V.I.C. § 33.

475 F.2d at 531. Guam contends that this case is distinguishable from Hamilton because Guam, unlike the Virgin Islands, has authorized the government to appeal from some superior court judgments in criminal cases. See Guam Crim. Proc. Code § 130.20(a) (1977).[2/] In Guam's view, once the government has received statutory authority to appeal certain judgments to the District Court of Guam, no further authority is required for similar appeals to this court.

We disagree. First, Guam Crim. Procedure Code § 130.20(a)(1977) purports only to authorize appeals to the District Court of Guam. Guam concedes that section 130.20(a) does not expressly authorize appeals from orders of the District Court. Section 130.20(a) thus does not provide the "express statutory authority" required for a government appeal in a criminal case.

Furthermore, we find that the Guam Legislature has no power to authorize appeals from orders of the District Court. Congress has explicitly delegated to the Guam Legislature the power to determine the appellate jurisdiction of the District Court of Guam. 48 U.S.C. § 14245(a) (Supp. 1979); see Guam v. Olsen, 431 U.S. 195, 200-01, 97 S.Ct. 1774, 1777-78, 52 L.Ed. 2d 250 (1977). The Guam Legislature has exercised this power by enacting Guam Crim. Proc. Code § 130.20(a) (1977), authorizing the government to bring appeals to the District Court in certain limited classes of cases. Congress has not, however, delegated to the Guam Legislature any power to determine the jurisdiction of the Ninth Circuit Court of Appeals. Section 130.30(a) thus could not provide authority for the government's appeal, even if the Guam Legislature intended it to do so.[3/] Our jurisdiction over appeals from the District Court of Guam, as over other matters, can be determined only by Congress.

Corn v. Guam Coral Co., 318 F.2d 622, 627 (9th Cir. 1963). Because Congress has not expressly authorized Guam's appeal in this case,[4/] we must dismiss for lack of jurisdiction.

Guam argues that decisions of the District Court of Guam should, as a matter of policy, be reviewable in this court. Guam correctly points out that its District Court is a territorial court, created under the authority of article IV, section 3 of the Constitution rather than under the authority of article III. Guam v. Olsen, 431 U.S. at 196 n.1, 97 S.Ct. at 1776 n.1.[5/] We recognize that the Supreme Court has been reluctant to find "foreclos[ure of] appellate review by Art. III courts . . . of decisions of territorial courts that may turn on questions of federal law." Id. at 201, 97 S.Ct. at 1778. In cases which do not raise double jeopardy concerns, this consideration clearly weighs in favor of

allowing Guam to appeal from the reversal of a conviction. But

> [i]f there is a serious need for [such] appeals . . . , it is the function of the Congress to decide whether to initiate a departure from historical pattern of restricted appellate jurisdiction in criminal cases. We must decide the case on the statutes that exist today . . .

Carroll v. United States, 354 U.S. 394, 407-08, 77 S.Ct. 1332. 1340, 1 L.Ed.2d 1442 (1957); see Arizona v. Manypenny, 608 F.2d 1197, 1200 (9th Cir. 1979), cert. granted, 445 U.S. 960, 100 S.Ct. 1644, 64 L.Ed.2d 234 (1980). Guam's appeal is not authorized by statute, and must be dismissed.[6/]

APPEAL DISMISSED.

FOOTNOTES

1/ Since "reversal on appeal would merely reinstate the jury's verdict, . . . it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged." United States v. Wilson, 420 U.S. at 344-45, 95 S.Ct. at 1022.

2/ Guam Crim. Proc. Code § 130.20(a) (1977) provides that:

> An appeal may be taken by the government from any of the following:
> (1) An order granting a new trial.
> (2) An order arresting judgment.
> (3) An order made after judgment, affecting the substantial rights of the government.
> (4) An order modifying the verdict on finding by reducing the degree of the offense or the punishment imposed. [sic]
> (5) An order or judgment dismissing or otherwise termina-

> ting the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

3/ Even if we were to find that Guam Crim. Proc. Code § 130.20(a) (1977) should be extended to cover appeals from the District Court of Guam,

> adoption of [Guam] law in this case does not aid [Guam's] case. As previously noted, the prosecution may appeal only where authorized to do so by statute. [citations] Adoption of [Guam] law as the federal rule would be a "common law" rule, even if based upon a [Guam] statute.

Arizona v. Manypenny, 608 F.2d 1197, 1200 (9th Cir. 1979), cert. granted, 445 U.S. 960, 100 S.Ct. 1644, 64 L.Ed.2d 234 (1980). In Manypenny we held that a state statute could not authorize a state to appeal from the reversal of a conviction in federal court.

> We do not reach the question of whether Congress could, by statute, delegate to the Guam Legislature or the legislatures of the states the power to authorize appeals by the govern-

ment from orders of the district courts. As is noted in the text, Congress has not delegated such power here.

4/ We note that Guam's appeal is not authorized by the Criminal Appeals Act, 18 U.S.C. § 3731 (1976), since "it is manifest that § 3731 is limited by its own terms to appeals by the United States as a prosecuting entity." Arizona v. Manypenny, 608 F.2d 1197, 1199 (9th Cir. 1979), cert. granted, 445 U.S. 960, 100 S.Ct. 1644, 64 L.Ed.2d 234 (1980).

5/ Guam also expresses concern that judges of the District Court of Guam" are appointed in a process which does not include approval, nomination, or confirmation by either the Government, the Legislature, or the People of Guam." Since the judges of this court are likewise appointed without Guam's participation, we

fail to see how permitting appeals to this court would alleviate Guam's concern.

6/ In dismissing the appeal, we do not reach the merits of appellant's case. We note, however, that the defendant raised two grounds for reversal not presented to the trial court: that the indictment should have been dismissed for the government's failure to produce certain tapes, and that the indictment should have been dismissed for speedy trial violations. The Appellate Division of the District Court of Guam dismissed the indictment on the ground, ignoring the general rule that an appellate court does not consider issues raised for the first time on appeal. This rule is merely a rule of practice, however, and can be relaxed where, for example, significant questions of general impact are raised; injustice might otherwise result; plain error has

occurred; resolution of the new issue is purely a matter of law and does not rely upon the factual record developed by the parties; or a new theory has first come to light during the pendency of the appeal because of a recent change in the law. See United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978); Krause v. Sacramento Inn, 479 F.2d 988, 989 (9th Cir. 1973). Thus, although the Appellate Division may have been justified in addressing the issue not raised before the trial court, in the future we encourage the court to articulate its reasons for doing so on the record so that the trial court and the parties understand the court's rationale for departing from the general rule.

APPENDIX C

PEOPLE OF THE TERRITORY
OF GUAM, Plaintiff-Appellant,

v.

Concepcion OKADA, Defendat-Appellee,

No. 80-1233

United States Court of Appeals,
Ninth Circuit

Appeal from the District Court of Guam, Appellate Division.

Argued and Submitted Nov.13, 1980.

Opinion Originally Filed April 19, 1981.

Withdrawn July 15, 1981.

Decided December 9, 1982.

Before SKOPIL, FLETCHER and PREGERSON, Circuit judges.

FLETCHER, Circuit Judge:

Concepion Okada was convicted in the Superior Court of Guam on charges of delivering heroin. The Appellate Division of the District Court of Guam (District Court) reversed the conviction and dismissed the indictment, holding that the Government's failure to preserve certain discoverable

evidence violated Okada's due process rights. The People of the Territory of Guam brought this appeal. Okada moved to dismiss, on the ground that Guam lacks statutory authority to appeal from the reversal of a conviction by the Appellate Division of the District Court of Guam. We postponed consideration of Okada's motion until the appeal was heard on the merits.

Our previous opinion, filed April 19, 1981, has been vacated. We now conclude that Guam's appeal is not authorized by statute. Accordingly, we grant Okada's motion and dismiss the appeal.

I

It has long been established that the Government may not appeal in a criminal case in the absence of express statutory authority. United States v. Wilson, 420 U.S. 332, 336, 95 S.Ct. 1013, 1018, 43 L.Ed.2d 232 (1975); Carroll v. United States, 354 U.S.

394, 400, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442 (1957); United States v. Sanges, 144 U.S. 310, 318, 12 S.Ct. 609, 612, 36 L.Ed. 445 (1892). The Supreme Court has explained that "'appeals by the Government in criminal cases are something unusual, exceptional, not favored,' . . . at least in part because they always threaten to offend the policies behind the double jeopardy prohibition." Will v. United States, 389 U.S. 90, 96, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967) (quoting Carroll, 354 U.S. at 400, 77 S.Ct. at 1336). But the rule prohibiting Government appeals except where expressly authorized by statute extends "over and above the constitutional protection against double jeopardy." DiBella v. United States, 369 U.S. 121, 130, 82 S.Ct. 654, 660, 7 L.Ed.2d 614 (1962). Although Guam's appeal would not violate the double jeopardy clause,[1/] we must nevertheless dismiss unless Guam can show that its appeal is expressly authorized by statute.

Pursuant to 28 U.S.C. § 1291 (1976), this court has jurisdiction over "all final decisions of . . . the District Court of Guam . . . except where a direct review may be had in the Supreme Court." However, section 1291 alone does not provide the necessary authority for Government appeals in criminal cases. Arizona v. Manypenny, 451 U.S. 232, 246, 101 S.Ct. 1657, 1666, 68 L.Ed.2d 58 (1981); Dibella, 369 U.S. at 130, 82 S.Ct. at 659-60; Umbriaco v. United States, 258 F.2d 625, 626 (9th Cir. 1958); Virgin Islands v. Hamilton, 475 F.2d 529, 531 (3d Cir. 1973).

Hamilton provides a close parallel to the present case. The District Court of the Virgin Islands had reversed a criminal conviction, and the Government of the Virgin Islands brought an appeal in the Third Circuit. The Third Circuit rejected the suggestion that section 1291, standing alone, authorized the Virgin Islands' appeal. Finding no other statutory authorization for the appeal, the

court dismissed for lack of jurisdiction. After reaching this result, the court noted that its conclusion was

> reinforced by the fact that under the local law of the Virgin Islands the defendant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court. 4 V.I.C. § 33.

475 F.2d at 531. Guam contends that this case is distinguishable from Hamilton because Guam, unlike the Virgin Islands, has authorized the Government to appeal from some superior court judgments in criminal cases. See Guam Crim. Proc. Code § 130.20(a) (1977).[2/] In Guam's view, section 130.20(a) provides authority for appeals to this court, as well as for appeals to the district court.

In Arizona v. Manypenny, 451 U.S. 232, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981), the Supreme Court discussed the statutory authority necessary for a Government appeal in a criminal case. The defendant in Manypenny was a federal officer charged with a state crime, who had removed his case to federal court pur-

suant to 28 U.S.C. § 1442(a)(1) (1976). The officer was convicted, but the trial court entered a judgment of acquittal. Although state law would have permitted an appeal by the state within its own court system, no statute expressly authorized the state to appeal from federal district court to the federal court of appeals.[3/]

The Supreme Court held that the statute authorizing an appeal within the state court system provided sufficient authority for the state's appeal within the state court system provided sufficient authority for the state's appeal in federal court. The Court reasoned that "[t]he need to restrict appeals by the prosecutor reflected a prudential concern that individuals should be free fromthe harassment and vexation of unbounded litigation by the sovereign." 451 U.S. at 246, 101 S.Ct. at 1666. The rule barring Government appeals except when authorized by statute was developed to meet this concern. However, the

Manypenny Court saw no reason to require express authorization by federal statute in every case. 451 U.S. at 247, 101 S.Ct. at 1667. Instead, the Court ruled that "[t]he intention to restrict sovereign power in this area is adequately addressed when the legislature responsible for the power has spoken in express terms." Id. at 249, 101 S.Ct. at 1668. In other words, if a state statute authorizes an appeal by the state in state court, that statute will provide authority for an appeal of a removal case in federal court as well.

II

The state statute involved in Manypenny authorized an appeal from a trial court to an appellate court. It is undisputed that Guam law authorizes an appeal from the Guam trial courts to an intermediate appellate court, the Appellate Division of the District Court of Guam. See Guam Crim. Proc. Code § 130.20(a)

(1977). The present case raises a different issue, however, the question we must answer is whether any law authorizes a second appeal, from the District Court to this court.

Guam takes the position that section 130.20(a) authorizes appeals by Guam from decisions of the District Court. Before we can consider whether the Guam legislature intended section 130.20(a) to authorize appeals from the District Court, we must inquire whether the Guam legislature has the power to authorize such appeals at all.

A

Article IV, section 3 of the Constitution give Congress plenary power over territories of the United States. Late Corporation of Latter-Day Saints v. United States, 136 U.S. 1, 32, 10 S.Ct. 792, 802, 34 L.Ed. 478 (1890). Guam, as an unincorporated territory, 48 U.S.C. § 1421a (1976), is subject to this plenary power. Agana Bay Development Co.

(Hong Kong) v. Supreme Court of Guam, 529 F.2d 952, 954 (9th Cir. 1976). congress has the power to legislate directly for Guam, or to establish a government for Guam subject to congressional control. Except as Congress may determine, Guam has no inherent right to govern itself. See First National Bank of Burnswick v. County of Yankton, 101 U.S. 129, 133, 25 L.Ed. 1046 (1880).

Guam's present form of government was established by Congress in 1950. Organic Act of Guam, ch. 512, 64 Stat. 384 (codified at 48 U.S.C. §§ 1421-1426 (176). The Organic Act created a Guam Legislature, and vested it with power "extend[ing] to all subjects of legislation of local application not inconsistent with the provisions of [the Organic Act] and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a. The provisions of the Organic Act thus set the outer limits of the Guam Legislature's authority. Agana Bay Development Co., 529 F.2d at 954; United

States v. Borja, 191 F.Supp. 563, 566 (D. Guam 1961).

With respect to the Guam court system, the Organic Act carefully distinguishes between those areas in which Guam is empowered to legislate, and those areas reserved to Congress. 48 U.S.C. § 1424.[4/] The Act creates a District Court of Guam and authorizes the Guam legislature to create other courts. The District Court is vested with original jurisdiction over federal questions and any local matters "jurisdiction over which has not been transferred bythe legislature to other court or courts established by it." Id. § 1424(a). The District Court is also given "such appellate jurisdiction as the legislature may determine." Id. The legislature is authorized to prescribe "[t]he jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam," id., but the federal rules of procedure are made applicable

"to the District Court of Guam and to appeals therefrom," id. § 1424(b).

B

Under the terms of the Organic Act, the Guam Legislature has no power to legislate procedure either in the District Court of Guam on appeal from the District Court to the Ninth Circuit. See Phelan v. Territory of Guam, 394 F.2d 293, 296 (9th Cir. 1968). If the authority to appeal in criminal cases is a matter of procedure, we must conclude that the Guam Legislature lacks power to authorize appeals from judgments of the District Court.

Judicial "procedure" has been defined as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction ofthem." Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1941); accord, Hanna v. Plumer, 380 U.S. 460 464, 85 S.Ct. 1136, 1140,

14 L.Ed.2d 8 (1965). In a criminal case such as this one, substantive law defines those acts which are considered crimes and establishes the punishment to be imposed upon violators. In contrast, the manner by which the Government prosecutes violators and enforces punishment involves procedure.

A restriction on appeals by the Government does not affect the rules by which courts decide whether the defendant has committed a crime. It simply limits the Government's ability to continue its prosecution, once a lower court has ruled in the defendant's favor. We conclude that the authority to take an appeal is procedural rather than substantive.[5/] See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 446 (1946).

Since Guam is barred from regulating "procedure in . . . the District Court of Guam," 48 U.S.C. § 1424(a), we hold that the Guam Legislature has no power to authorize government appeals from judgments of the

District Court of Guam. Section 130.20(a) of the Guam Crim. Proc. Code thus cannot provide the express statutory authority necessary for the Government's appeal.

III

Guam argues that decisions of the District Court of Guam should, as a matter of policy, be reviewable in this court. Guam correctly points out that its District Court is a territorial court, created under the authority of article IV, section 3 of the Constitution rather than under the authority of article III. Guam v. Olsen, 431 U.S. 195 at 196 n. 1, 97 S.Ct. 1774 at 1776 n.1, 52 L.Ed.2d 250 (1977).[6/] The Supreme Court has been reluctant to "foreclose appellate review by Art. III courts . . . of decisions of territorial courts in cases that may turn on questions of federal law." Id. at 201, 97n S.Ct. at 1778.

Although this policy consideration may be a strong one, Guam's argument is more properly addressed to Congress than to this court. As the Supreme Court said in Carroll v. United States, 354 U.S. 394, 407-08 (1957), "[i]f there is a serious need for [these] appeals . . . , it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." In other areas, Congress has shown itself capable of authorizing appeals from the District Court of Guam. See 28 U.S.C. § 1252 (1976) (direct appeals to Supreme Court).[7/] It has not done so here, nor has it delegated to the Guam Legislature the power to authorize appeals by Guam in criminal cases.

There being no statutory authority for Guam's appeal, the appeal must be dismissed.[8/]

DISMISSED

FOOTNOTE

1/ "[I]t is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged," since "reversal on appeal would merely reinstate the jury's guilty verdict." United States v. Wilson, 420 U.S. at 344-45.

2/ Guam Crim. Proc. Code § 130.20(a) (1977) provides that:

> An appeal may be taken by the government from any of the following:
> (1) An order granting a new trial.
> (2) An order arresting judgment.
> (3) An order made after judgment, affecting the substantial rights of the government.
> (4) An order modifying the verdict on finding [sic] by reducing the degree of the offense or the punishment imposed.
> (5) An order or judgment dismissing or otherwise terminating the action before the defendant has been

placed in jeopardy or where the defendant has waived jeopardy.

3/ The Criminal Appeals Act, 18 U.S.C. § 3731 (1976), authorizes criminal appeals "by the United States" whenever such appeals are not barred by the double jeopardy clause. See United States v. Wilson, 420 U.S. 332, 337 (1975). This court held in Arizona v. Manypenny, 608 F.2d 1197, 1199 (9th Cir. 1979), that section 3731 was "limited by its own terms to appeals by the United States as a prosecuting entity." The Supreme Court declined to decide whether section 3731 authorizes federal appeals by prosecuting entities other than the United States. Manypenny, 451 U.S. at 243 n.18. In absence of Supreme Court instructions to the contrary, we adhere to our former view and hold that section 3731 does not authorize appeals by prosecuting entities such as states and territorial governments.

4/ 48 U.S.C. § 1424 provides in relevant part:

> (a) There is created a court of record to be designated the "District Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as many have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such apppellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam.
>
> . . . .
>
> (b) The rules heretofore or hereafter promulgated and made effective by the Supreme Court of the United States pursuant to section 2072 of Title 28, in civil cases; section 2073 of Title 28, in admiralty cases; sections 3771 and 3772 of Title 18, in criminal cases; and section 2075 of Title 28 in cases under Title 11; shall apply to the District Court of Guam and to appeals therefrom . . . .

5/ Both the Guam Legislature and the United States Congress apparently view the right to appeal as procedural. Guam has placed its statute authorizing Government appeals within its Code of Criminal Procedure, see Guam Crim. Proc. Code § 130.20(a) (1977), while the federal Criminal Appeals Act is codified within the Part of Title 18 captioned "Criminal Procedure," see 18 U.S.C. § 3731 (1976).

6/ Guam also expresses concern that judges of the District Court of Guam "are appointed in a process which does not include approval, nomination, or confirmation by either the Government, the Legislature, or the People of Guam." Since the judges of this court are likewise appointed without Guam's participation, we fail to see how permitting appeals to this court would alleviate Guam's concern.

7/ Section 1252 provides that "[a]ny party may appelal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States [or] . . . the District Court of Guam . . . holding an Act of Congress unconstitutional . . . " (emphasis added). It stands in sharp contrast to the Criminal Appeals Act, which provides that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court" under certain enumerated circumstances. 18 U.S.C. § 3731 (1976) (emphasis added). The former version of section 3731 allowed some direct appeals to the Supreme Court in criminal cases, but only "by and on behalf of the United States from the district courts." Act of June 25, 1948, ch. 645, 62 Stat. 844.

8/ In dismissing the appeal, we do not reach the merits of Guam's case. We note, however, that the defendant raised two grounds for reversal not presented to the trial court: that the indictment should have been dismissed for the Goernment's failure to produce certain tapes, and that the indictment should have been dismissed for speedy trial violations. The Appellate Division of the District Court of Guam dismissed the indictment on the first ground, ignoring the general rule that an appellate court does not consider issues raised for the first time on appeal. This rule is merely a rule of practice, however, and can be relaxed where, for example, significant questions of general impact are raised; injustice might otherwise result; plain error has occurred; resolution of the new isue is purely a matter of law and does not rely upon the factual record developed by the

parties; or a new theory has first come to light during the pendency of the appeal because of a recent change in the law. See United States v. Krause, 614 F.2d 1229, 1235-36 (9th Cir. 1980); United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978); Krause v. Sacramento Inn, 479 F.2d 988, 989 (9th Cir. 1973). Thus, although the District Court may have been justified in addressing the issue not raised before the trial court, in the future we encourage the court to articulate its reasons for doing so on the record so that the trial court and the parties understand the court's rationale for departing from the general rule.

APPENDIX D
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE TERRITORY OF GUAM,	)	No. 80-1233
Plaintiff-Appellant,	)	D.C. Crim. No. 78-00041A
vs.	)	S.C. Crim. No. 34F-78
CONCEPCION OKADA,	)	ORDER FOR PUBLICATION
Defendant-Appellee.	)	

Before: SKOPIL, FLETCHER and PREGERSON, Circuit Judges

The petition for rehearing is hereby denied.

The panel opinion of December 9, 1982 is amended to add to the end of existing footnote 3 the following:

> But see Virgin Islands v. Christensen, 673 F.2d 713, 716-17 3d Cir. 1982) (holding that amended section 3731 authorizes appeals in federal court by a territorial government). The court's reasoning

in Christensen is (1) that section 3731 authorizes appeals by the United States in all criminal cases unless double jeopardy is implicated, United States v. Wilson, 420 U.S. at 337; and, (2) that a territorial government is within the intendment of "United States" in section 3731 because double jeopardy precludes successive prosecutions by a territorial government and the United States. See United States v. Wheeler, 435 U.S. 313, 321 (1978). The latter proposition, however, is not compelled by Wilson and Wheeler. The questions of what is constitutionally permitted and what is statutorily authorized, are, of course, distinct issues. The successive prosecution issue discussed in Wheeler involves the constitutional bar of double jeopardy. The question of the authority

of territorial governments to appeal is one of statutory interpretation of section 3731. We find nothing in the language of section 3731 or its legislative history to indicate an intent to authorize an appeal in a criminal case by territorial government. 18 U.S.C. § 3731 (1976); Conf. Rep. No. 81-1768, 91st Cong., 2d Sess. ____, reprinted in 1970 U.S. Code Cong. & Ad. News 5804, 5842, 5848 (discussing amendments to section 3731). In fact, we find evidence of an opposite intent. Section 3731, in part, authorizes "[a]n appeal by the United States . . . if the United States Attorney certifies . . . that the appeal is not taken for purposes of delay . . . .". 18 U.S.C. § 3731 (emphasis added). If Congress had intended to include territorial prosecutors within the

authority of section 3731, it is unlikely that Congress would have made reference only to the United States Attorney.

The Christensen court declined to overrule Virgin Islands v. Hamilton, 475 F.2d 529 (3d Cir. 1973), indicating an unwillingness to find power in the legislature of the Virgin Islands to authorize an appeal. Its resort to section 3731 for such authority we find unwarranted. We agree with Judge Sloviter's concurrence in Christensen that the majority places undue emphasis on the Supreme Court's use of the word "sovereign" in Manypenny. See 673 F.2d at 716 (quoting Manypenny, 451 U.S. at 249). As Judge Sloviter notes, the real focus of the inquiry under Manypenny is on whether "the legisla-

ture responsible for [the exercise of the prosecutorial] power has spoken in express terms," not on fine distinctions of sovereignty. See id. at 720 (Sloviter, J., concurring) (quoting Manypenny, 451 U.S. at 249. In both this case and Christensen, the legislature immediately responsible for the exercise of prosecutorial authority is that of the territory. Without authorization from Congress, the legislature of the territory is powerless to authorize an appeal by the Government of Guam to our court. See discussion under II B herein.

The full court has been advised of the suggestion for a rehearing en banc and the majority of judges has voted to reject the suggetion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is REJECTED.

A TRUE COPY
ATTEST SEP 20 1983
PHILLIP B. WINBERRY

Clerk of Court

by: Oscar Malabuyo
Deputy Clerk